U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 29 September 2006

BALCA Case No.: **2005-INA-00158**
ETA Case No.: P2002-CA-09538047/JS

In the Matter of:

NATURE'S ENVY,
Employer,

on behalf of

FRANCELIA MENDOZA,
Alien.

Appearance: Frank E. Ronzio, Esquire
Los Angeles, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Floral Designer.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on

STATEMENT OF THE CASE

On April 10, 2001, Employer, Nature's Envy, filed an application for labor certification to enable the Alien, Francelia Mendoza, to fill the position of Floral Designer. (AF 61). The salary was $11.90 per hour. Employer requested two years of experience in the job offered, which was described as follows:

> Transform verbal instructions/specifications into sketches/drawings & create and construct lifelike artificial plants/trees & period pieces for special high end applications in the interior design industry, wholesale/commercial sale, and residential decorations. Company carries various lines of products & will design/fashion artificial arrangements for events. Plan arrangement utilizing knowledge of design & properties of materials. Selects flora & foliage necessary for arrangements. Trims material/arranges bouquets, sprays, wreaths, dish gardens, terrariums & other items using wire, pins, floral tape, foam, trimmers, cutters, shapers/other materials & tools. Must be familiar with flower & plant names, proper care & handling of flowers. 10 Openings for consideration.

(AF 61). In a letter detailing its recruitment results, Employer indicated that it received the resume of one applicant, who when telephoned indicated her inability to transform verbal instructions and specifications into sketches and drawings as required in the advertisement. (AF 65).

On September 10, 2004, the CO issued a Notice of Findings ("NOF") proposing to deny certification on the grounds that (1) the Employer had failed to show that U.S. workers were rejected for lawful, job-related reasons; (2) there was a restrictive combination of duties; and (3) Employer had failed to show that two years of experience was its true minimum requirement for the position. (AF 55). Specifically, the CO found that the one applicant who applied appeared to be qualified for the position, as her resume revealed three years and eleven months of experience as a floral designer. The applicant submitted a work reference, a copy of a performance evaluation, and photographic samples of her work. Despite Employer's stated reason for her

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the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

rejection, the CO determined that she met the normal requirement for the position as set forth in the Dictionary of Occupational Titles ("DOT"), which did not require any significant sketch art requirement. The CO also found that there was no evidence of any substantial sketching requirement or that any significant sketch art requirement was justified in combination with the duties of a floral designer.

Employer was directed to provide rebuttal documenting that this U.S. applicant was recruited in good faith and was rejected solely for lawful-job related reasons. If Employer intended to argue that this applicant was not qualified, then Employer needed to submit a justification for the combination of duties. In this respect, the CO determined that the position offered appeared to include an improper combination of duties, those being floral designer and commercial designer or illustrator, DOT 141.061-038 and 141.061-022. Employer was directed to revise the job duties, justify the combination of duties as a business necessity, or establish that such employment was normal or customary in the area of intended employment.

The CO further found that the two years of experience required as a floral designer did not appear to meet Employer's true minimum requirements, as the ETA 750B did not clearly indicate that the Alien had this experience prior to her hire. Employer was directed to amend the ETA 750B to show the complete address of the Alien's previous employer and the months in which she started and ended her employment with that employer. If the documentation did not establish the requisite amount of experience, then Employer needed to amend the excess experience requirement and agree to retest the labor market. If Employer wished to retain the requirement, it needed to provide convincing justification that it was not now feasible to hire anyone with less than this requirement, or document that the occupation in which the Alien was hired was dissimilar from the occupation for which Employer was seeking labor certification, or document that the Alien had obtained the experience elsewhere.

Employer submitted rebuttal on October 11, 2004. (AF 40). Employer contended that to perform the duties of a floral designer, a qualified candidate had to have the skills to transform verbal instructions/specifications into sketches. With regard to the combination of duties,

Employer argued that floral designers employed by it had direct communication with clients, and had to understand the needs and requirements of the client in order to prepare sketches and drawings that the employee would then utilize to construct the sample. According to Employer, it was crucial to have one individual who could prepare the sketches/drawings as well as the sample of the artificial plant, tree, or floral arrangement for the customer. Employer argued that to have more than one worker performing these duties would be impractical, as the clients would be extremely frustrated by having to give verbal instructions to one individual, then communicate with a second individual who was constructing the sample, when the instructions given to the illustrator may not be understood, yet not by the floral designer. Employer argued further that it has always employed floral designers who had the ability to do this combination of duties.

Employer indicated that if the Department of Labor was not willing to accept its arguments, Employer was willing to revise the job duties and eliminate the requirement to transform verbal instructions into sketches, and to retest the labor market. Employer also amended the ETA 750B to indicate that the Alien had two and a half years of the requisite experience prior to her hire. Employer submitted an amended job description. (AF 51). Copies of passports and permanent resident cards were also included.

A Final Determination ("FD") was issued on December 21, 2004. (AF 32). The CO noted that Employer's stated willingness to retest the labor market was contradictory to its attempt to argue that the combination of duties was essential. The CO stated that while the NOF had indicated that Employer had not submitted any evidence of substantial sketching or drawing, the rebuttal included photographs of designs but no drawings or sketches. The CO indicated that Employer had submitted copies of driver's licenses, which the CO found did not demonstrate the scope of the drawing and sketching abilities of these individuals.

The CO did not find Employer's argument regarding the need for the combination of duties persuasive, and concluded that Employer had failed to document that the U.S. worker who

applied was rejected solely for job-related reasons. Labor certification was denied without offering Employer the chance to retest the labor market with the combination of duties.

On January 24, 2005, Employer's Request for Review of a Denial of Certification was filed. (AF 1). This matter was then forwarded to the Board of Alien Labor Certification Appeals ("Board"). The Board docketed the case on June 9, 2005.

DISCUSSION

In its Request for Review of a Denial of Certification, Employer argues that it justified the combination of duties as a business necessity, the CO erred in stating in the FD that Employer had not submitted any evidence of substantial sketching or drawing as that issue was raised for the first time in the FD, and the CO must allow Employer to cure the defect with argument or documentation if it is not allowed to readvertise the job opportunity.

Specifically, Employer argues that the FD mentions, for the first time, the failure to submit evidence of substantial sketching or drawing, and if same had been requested in the NOF, Employer would have provided such evidence. Employer also notes that the CO erred in claiming that photographs of designs were provided in rebuttal. While Employer is correct in the latter statement, the error on the part of the CO in this respect is harmless. Employer is also correct that the NOF did not specifically require submission of sketches or drawings. Nonetheless, in the NOF, the CO found that there was no evidence of any substantial sketching requirement or that any significant sketch art requirement was justified in combination with the duties of a floral designer. Thus, it cannot be said that the issue was raised for the first time in the FD, as the CO clearly warned Employer of this deficiency.

Employer also argues that it submitted copies of U.S. passports and Legal Permanent Resident cards of employees currently employed by it who are required to perform the combination of duties. The CO erroneously stated that driver's licenses were provided, which according to Employer, merits a review of the decision. This reasoning is faulty, however, as the

CO's error is harmless and the point made by the CO remains valid, i.e., the documentation provided does not demonstrate that these individuals were required to perform the combination of duties involved herein.

Finally, with respect to the finding that the job requirements were unduly restrictive, Employer cites to *Matter of O'Mara*, 1996-INA-113 (Dec. 11, 1997) (*en banc*) in support of its argument that the CO must allow Employer to cure the defect, and if the cure is not accepted, to readvertise the job opportunity. In *Ronald J. O'Mara,* the Board held that an employer did not engage in good faith recruiting and therefore, the holding in *A. Smile*, 1989-INA-1 (March 6, 1990) was found not applicable and labor certification was denied. In *A. Smile*, the Board held that an employer must be afforded an opportunity to readvertise a position if the justification for the business necessity of a job requirement was not accepted and the employer had indicated its willingness to modify the job requirements and readvertise under such circumstances.

In *O'Mara*, as is the situation herein, the employer did make such an offer. However, just as in that case, the CO herein also denied labor certification on the basis that the employer did not engage in good faith recruiting, rendering the holding in *A. Smile* inapplicable. Furthermore, if, as Employer indicates, it is willing to delete the requirement found to be unduly restrictive, then the U.S. applicant, who was rejected for failing to possess that requirement, was unlawfully rejected. Employer, therefore has failed to establish that it engaged in good faith recruiting, and the CO did not err in denying labor certification. Accordingly, the following Order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.